Petition

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31-923

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

ODELL C. TANT

t/a SUPER DUPER FOOD STORE
Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Circuit Court of Appeals for the Fourth Circuit has denied Petitioner a trial *de novo*, pursuant to 7 U.S. C. §2023, by limiting the scope of judicial review of the sanction imposed by the Secretary of Agriculture.

2. Whether the decision of the Food and Nutrition Service to disqualify the Super Duper Food Store from redeeming food stamps for a period of sixty days was arbitrary and capricious, in contravention of the due process clause of the Fifth Amendment of the United States Constitution.

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The Petitioner, Odell Tant, transacting business as the Super Duper Food Store, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on August 17, 1981.

OPINIONS BELOW

Fourth Circuit: The opinion of the United States Court of Appeals for the Fourth Circuit (Appendix p. 21) has not yet been reported.

United States District Court: The opinion of the Honorable Logan D. Howell, United States Magistrate, rendered on October 31, 1980 (Appendix p. 33) was not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTONAL PROVISIONS, STATUTES, AND GUIDELINES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "now [shall any person] be deprived of life, liberty or property, without due process of law . . . ."

7 U.S.C. §2023 reads as follows:

> §2023. Administrative and judicial review
>
> Whenever an application of a retail food store or wholesale food concern to participate in the food stamp program is denied pursuant to section 9 of this Act [7 USCS §2018], or a retail food store or wholesale food concern is disqualified or subjected to a civil money penalty under the provisions of section 12 of this Act [7 USCS §2021], or all or part of any claim of a retail food store or wholesale food concern is denied under the provisions of section 13 of this Act [7 USCS §2022], or a claim against a State agency is stated pursuant to the provisions of section 13 of this Act [7 USCS §2022], notice of such administrative action shall be issued to the retail

food store, wholesale food concern, or State agency involved. Such notice shall be delivered by certified mail or personal service. If such store, concern, or State agency is aggrieved by such action, it may, in accordance with regulations promulgated under this Act, within ten days of the date of delivery of such notice, file a written request for an opportunity to submit information in support of its position to such person or persons as the regulations may designate. If such a request is not made or if such store, concern, or State agency fails to submit information in support of its position after filing a request, the administrative determination shall be final. If such request is made by such store, concern, or State agency, such information as may be submitted by the store, concern, or State agency, as well as such other information as may be available, shall be reviewed by the person or persons designated by the Secretary, who shall, subject to the right of judicial review hereinafter provided, make a determination which shall be final and which shall take effect thirty days after the date of the delivery or service of such final notice of determination. If the store, con-

cern, or State agency feels aggrieved by such final determination, it may obtain judicial review thereof by filing a complaint against the United States in the United States court for the district in which it resides or is engaged in business, or, in the case of a retail food store or wholesale food concern, in any court of record of the State having competent jurisdiction, within thirty days after the date of delivery or service of the final notice of determination upon it, requesting the court to set aside such determination. The copy of the summons and complaint required to be delivered to the official or agency whose order is being attacked shall be sent to the Secretary or such person or persons as the Secretary may designate to receive service of process. The suit in the United States district court or State court shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue. If the court determines the validity of the questioned administrative action in issue. If the court determines that such administrative action is invalid, it shall enter such judgment or order as it determines is in accordance with the law and the evidence. During the pendency of such

> judicial review, or any appeal therefrom, the administrative action under review shall be and remain in full force and effect, unless an application to the court on not less than ten days' notice, and after hearing thereon and a showing of irreparable injury, the court temporarily stays such administrative action pending disposition of such trial or appeal.

The Department of Agriculture Guidelines, FNS (FS) Instruction 744-9, issued March 13, 1970, are set forth at Appendix, pp. 52.

STATEMENT OF THE CASE

After full administrative proceedings, the Food and Nutrition Service (hereinafter referred to as FNS) held that Petitioner Odell Tant, doing business as the Super Duper Food Store, had accepted food stamps in payment for unqualified purchases. The FNS disqualified Petitioner from redeeming food stamps for a period of sixty days, and Petitioner, exercising his right to judicial review of the final administrative decision, filed a complaint in North Carolina General Court of Justice.

Respondent United States of America removed the action to the Federal District Court for the Eastern District of North Carolina, Raleigh Division. The case was eventually heard without a jury before the Honorable Logan D. Howell, United States Magistrate, who affirmed

the decision disqualifying Petitioner for sixty days. Petitioner then appealed to the United States Court of Appeals for the Fourth Circuit, who, after hearing arguments before a three-member panel in Wilmington, North Carolina, affirmed the Magistrate's decision. Both the United States Magistrate and the Fourth Review Circuit reviewed the sanction imposed by examining whether the Department of Agriculture had acted in an "arbitrary and capricious" manner in specifying Petitioner's 60 day suspension.

REASONS FOR GRANTING THE WRIT

While this case is important to Petitioner in that he faces significant economic consequences because of his disqualification, the issues of this case are more widely reaching. Both of the questions presented in this Petition have direct bearing upon the standard of review afforded to aggrieved parties who appeal, pursuant to 7 U.S.C. §2023, the penalties imposed under the Food Stamp Act.

1. Denial of Trial de novo as to Disqualification.

7 U.S.C. §2023 (formerly 7 U.S.C. §2022) prescribes the standard of judivial review for Petitioner and those similarly situated:

> The suit in United States District Court or state court shall be a trial de novo by the court in which the court shall determine the validity of the questioned adminis-

> trative action in issue. If the court determines that such administrative action is invalid, it shall enter such judgment or order as it determines is in accordance with the law and the evidence.

Despite this clear mandate by Congress, de novo review in disqualification cases has been limited by the Fourth Circuit to a review of the determination that a violation occurred. Review of the period of disqualification imposed after a violation is found has been restricted by the courts to a determination of whether the Food and Nutrition Service acted in an "arbitrary and capricious" manner in imposing the penalty. See Cross v. United States, 512 F.2d 1212 (4th Cir. 1975). A similar standard has been adopted in the First and Fifth Circuits. Kulkin v. Bergland, 626 F.2d 181 (1st Cir. 1980); Bruno's, Inc. v. United States, 624 F.2d 592 (5th Cir.

1980).

Parties wishing to appeal the period of disqualification imposed by the Food and Nutrition Service fare even worse in the Sixth and Seventh Circuits. There, judicial review of the period of disqualification imposed is completely denied, those Circuits holding that the trial de novo provision of 7 U.S.C. §2023 does not extend to a review of the penalty. Martin v. United States, 459 F.2d 300 (6th Cir. 1972) cert. denied 409 U.S. 878, 93 S.Ct. 129, 34 L.Ed.2d 131; Nowicki v. United States, 536 F.2d 1171 (7th Cir. 1976).

Such judicially imposed restrictions on the de novo mandate of 7 U.S.C. §2023 have brought forth well reasoned dissent. When the majority in Martin, supra, held that the reviewing court lacked authority to change sanctions imposed by the Secretary of Agriculture,

Judge Edwards dissented based upon the clear meaning of 7 U.S.C. §2022 (now 7 U.S.C. §2023):

> Congress saw fit to provide for a "trial de novo" in the District Court. Under any normal construction of legal language, such a grant of power gives to the reviewing court all the power that the court or agency below possessed, including the power to enter a disposition of judgment different from that originally entered.

459 F.2d at 302 (Edwards, dissenting).

Congress has the power to authorize review of administrative action by the courts to such extent as it deems necessary. Labor Board v. Cheney Lumber Co., 327 U.S. 385, 66 S.Ct. 553, 90 L.Ed 739 (1946); Estep v. United States, 327 U.S. 114, 66 S.Ct. 423, 90 L.Ed. 567 (1946). The clear Congressional mandate of 7 U.S.C. §2023 moved Judge Widener to take issue with the limited review imposed by the majority in Cross, supra:

> Since the "administrative action" must consist both of the finding of a violation and punishment of disqualification, I think the Statute . . . may only be construed as granting a full right of review. The court's judgment is by statute to be based on its determination of both the law and the evidence, and I see no reason to read into this perfectly plain language a judicially imposed restriction [emphasis supplied].

512 F.2d at 1219 (Widener, concurring).

The conflict among the Circuits, as well as the plain language of 7 U.S.C. §2023, clearly calls for a final determination by this Court. Presently, aggrieved parties who stand as Petitioner are faced with conflicting standards of review among the Circuits. Furthermore, the trial de novo mandate of 7 U.S.C. §2023 goes unheeded by courts called on to review sanctions imposed by the Secretary of Agriculture.

2. Arbitrary and Capricious Action

Under the rule of Cross, supra,

"the views of the Secretary as to the appropriate sanction in a given case are entitled to very great, if not conclusive, weight." 512 F.2d at 1218. The result of such a rule is that courts reviewing periods of disqualification merely determine whether the penalty imposed is permitted by the Department of Agriculture Guidelines 744-9 (issued March 13, 1970). See, e.g., Herlings Grocery Basket, Inc. v. United States, 538 F.2d 86 (4th Cir. 1976). Indeed, examination of the opinions of the United States Magistrate and Fourth Circuit indicate that Petitioner's sanction was reviewed in such a manner. See App. pp. 31-32; 50-51).

The inequity inherent in such a shallow review is evidenced by Petitioner's case. Under the 744-9 Guidelines of the Department of Agriculture, the penalty imposed on

Petitioner could have ranged from a one year disqualification to a simple letter of warning, and still have fallen within permitted limits. Thus, when the penalty imposed falls within those broad limits, the practical effect of the Fourth Circuit rule is to afford Petitioner no judicial review at all. Therefore, the Secretary of Agriculture is given unreviewable discretion to imposed sanctions with financial consequences ranging from hundreds of thousands of dollars to nothing at all.

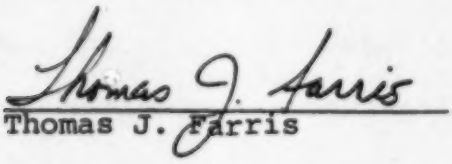
Even if a penalty is within the applicable guidelines, it should be reviewable if the Secretary and his designates acted arbitrarily and capriciously in choosing which guidelines to emphasize in assessing the penalty. 624 F.2d at 597. In Bruno's, supra, the Fifth Circuit affirmed the District

Court's reduction of a 60-day penalty to a letter of warning in a case virtually identical on its facts to Petitioner's, even though the 60-day penalty imposed was within the range permitted by the guidelines. There, the court pointed out that, taking all the pertinent criteria of Guidelines 744-9 into consideration, mitigating factors outweighed aggravating factors in Bruno's case. 624 F.2d at 595.

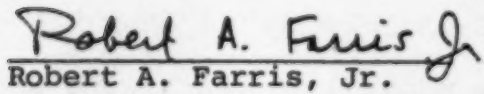
Similarly, Petitioner has consistently maintained that, were such a balancing test used in his case, mitigating factors outlined in Guidelines 744-9 would call for a less severe sanction. However, Petitioner has been unable thus far to move any court to look beyond the fact that the disqualification was permissible under the guidelines. Unless certiorari is granted by this Court, Petitioner will have exhausted his

appellate avenues without ever having obtained a qualitative and balanced judicial review, under any standard, of the administrative decision to impose a 60-day disqualification on his business.

Respectfully submitted,



Thomas J. Farris



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APPENDIX

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 81-1053

Odell C. Tant, t/a Super Duper Food Store,

Appellant,

versus

United States of America,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilson. Logan D. Howell, Magistrate.

Argued July 14, 1981. Decided August 17, 1981

Before PHILLIPS, MURNAGHAN and ERVIN, Circuit Judges.

Thomas J. Farris (Robert A. Farris, Jr. on brief) for Appellant; Abraham Penn Jones, Assistant United States Attorney (James L. Blackburn) United States Attorney on brief) for Appellee.

PER CURIAM:

Mr. Odell C. Tant sought judicial review pursuant to 7 U.S.C. §7022 of a final administrative decision of the Food and Nutrition Service (FNS) of the United States Department of Agriculture suspending for sixty days his right to redeem food stamps at his grocery store. After a de novo trial, the Magistrate found that the sixty-day disqualification was not arbitrary and capricious or without justification in fact, and declined to modify the penalty. Mr. Tant appeals the dismissal of his suit, claiming that the FNS has violated its own guidelines and regulations and has improperly considered the high volume of food stamp redemption in setting the penalty.

Mr. Tant owns and operates the Super Duper Food Store in a predominantly black, low-income section of Wilson, North Carolina. From 1970 to 1977, although no

violations were ever found, agents of the FNS made seven "educational" visits and six "compl ance" visits to his store. On three occasions confirming letters were sent by FNS to Mr. Tant outlining areas of concern. Nonetheless, during the entire period, the store was neither charged with a violation of the food stamp program nor placed under formal investigation. FNS agents reported that the store's high redemption rate was due to the store's location in a low-income area and to Mr. Tant's sales and advertising techniques. Mr. Tant and his assistant were found to have a good understanding of food stamp regulations.

On March 22, 23, and 24, 1977, FNS conducted a formal investigation of the Super Duper Food Store. Two FNS agents made six attempts to purchase ineligible items with food stamps. On four of the

six attempts they were successful. Sixty-three percent of their total purchases were ineligible items, including beer, cigarettes, soap, paper products, and other nonfood items. All of the ineligible purchases were made from one clerk, Mrs. Ilda Bryant, at a time when she was the only checkout cashier in the store, and at a time when Mr. Tant and his assistant were not present.

On June 24, 1977 FNS sent Mr. Tant a notice that it had reason to believe that the store had violated the food stamp regulations. Mr. Tant protested the charge in a personal visit to the FNS field office, but was found in violation and given a 60-day suspension. This decision was upheld by the Agency on October 12, 1977. Mr. Tant then sought de novo review before a state court, and FNS removed to the federal district court.

At the de novo hearing in federal district court, the magistrate heard testimony from a number of witnesses, including the clerk who allowed purchase of the ineligible items. Mrs. Bryant testified that she had a history of nervousness and was uneasy and uncomfortable in the presence of the two investigators, who were unshaven, large white males, wearing old clothes. Because the store is in a predominantly black area, and it was unusual to see white males in the store, she testified that she was uncomfortable and intimidated, and felt she had to accept their food stamps in payment for all purchases.

The magistrate concluded that even assuming as true all the testimony concerning the appearance and activities of the undercover agents in the store, these facts failed to show that a clerk with Mrs. Bryant's age and maturity, with

twelve years' tenure at Mr. Tant's store, could reasonably have been frightened or intimated sufficiently to violate understood policy. He therefore rejected as inherently incredible her explanation for the sales. Applying the rule of the Fourth Circuit in Cross v. United States, 512 F.2d 1212 (4th Cir. 1975), which allows judicial review of the administrative sanction imposed for a violation of the Food stamp Act under an abuse of discretion standard, the magistrate found that the imposition of a sixty-day penalty fell clearly within the range envisioned by the regulation. Upon this evidence, the magistrate found the FNS could have imposed an even stiffer sanction. There was therefore no abuse of discretion.

Mr. Tant argues that the FNS violated its own regulations because it did not send a warning letter prior to

charging him with a violation. Without a warning letter, he argues, the penalty should have been thirty rather than sixty days. Section 278.6 of Title VII of C.F.R. governs disqualification of retail food stores for food stamp violations. Subsection (e) outlines the penalties that should be imposed in various situations. Subparagraph (2) provides for a one-year suspension if it is the "firm's policy to sell expensive or conspicuous nonfood items, cartons of cigarettes, or alcoholic beverages . . . and the firm has engaged in such practices. . . ." 7 C.F.R. §278.6(e)(2)(i)(A). For unusually serious violations, no warning letter is needed. Id. §278.6(e)(2)(ii).

Other subsections provide for lesser periods of disqualification in less severe circumstances. Paragraph (5) provides:

(5) Disqualify the firm for 60 days if the evidence shows that violations such as those described in paragraph (3)(i) of this subsection occurred, but that the violations resulted from carelessness or poor supervision by the firm's ownership or management.

Paragraph (3)(i) reads:

(i) The evidence shows that it is the firm's policy to commit violations such as the sale of common nonfood items in amounts normally found in a shopping basket and the firm was warned about the possibility that violations were occurring and of the possible consequences of violating the regulations, ...

Mr. Tant argues that because no warning letter was sent paragraph (6)(i) should apply:

(6) Disqualify the firm for 30 days if the evidence shows that:

(i) Violations such as those described in paragraph (3)(i) of this subsection occurred as a result of carelessness or poor supervision by the firm's ownership or management, but FNS has not specifically warned the firm

> about the possibility that violations are occurring and of the possible consequences of violating the regulations,
> . . . .

Mr. Tant's argument is without merit because among the ineligible items sold were cigarettes and beer, clearly not "common nonfood items." Mr. Tant's situation does not fall neatly into any paragraph under §278.6(e). Given the number and kind of ineligible items purchased, it was well within the discretion of FNS and within the scope of the regulations to disqualify him for sixty days even though no warning letter had been issued.

Mr. Tant also asserts that the failure of FNS to follow the guidelines governing the imposition of sanctions, FNS Guidelines 744-9, was an abuse of discretion. Specifidally, Section IVF of the Guidelines states that "[a] warning

letter will normally be the final determination in the following situations: . . . (3) The evidence clearly shows that the violations occurred contrary to the retailer's policy." Because the sales here were apparently contrary to Mr. Tant's policy, he argues that a warning letter was the appropriate sanction. Those Guidelines further provide, however, that in determining whether the violations warrant a more serious penalty, the FNS should consider many factors, including the ratio of ineligible items to total purchases, §III(A)(4)(b), the types of ineligible items, §III(A)(4)(a),[1/] the portion

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[1]Section III(A)(4)(a) divides ineligible items into three categories:

> (1) Marginal Ineligible Items are items which can easily be mistaken for eligible items and sold for coupons through oversight.

(Continued on next page)

of clerks involved, §III(A)(5), whether the sales were inadvertent or deliberate, §III(A)(4)(b) and (B), and whether the violations were pursuant to store policy, §III(B)(4).

There were several factors present here which make this violation potentially serious. Sixty-three percent of the items purchased were ineligible. Further, there were some major non-grocery items sold, most particularly beer. We find no abuse of discretion in the FNS determination that a warning letter need not be issued prior to charging a violation.

We find no error in the magistrate's analysis. The FNS acted well within the

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EXAMPLES: canned pet food or imported food products.
(2) Common Grocery Type Ineligible Items are easily identifiable ineligible items of low cost.

(Continued on next page)

scope of both the regulations and the guidelines in imposing a sixty-day penalty. We also find no indication that the store's history of a greater than average rate of food stamp redemption was a factor in setting the penalty.

AFFIRMED.

EXAMPLES: cleaning products such as soap, or paper products such as toilet tissue.
(3) Major Non-Grocery Type Ineligible Items are alcoholic beverages and easily identifiable items of high cost.
EXAMPLES: clothing, home furnishings, hardware, cartons of cigarettes, or alcholic beverages.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

ODELL C. TANT, T/A SUPER DUPER FOOD STORE NO.	77-56-CIV-8
v.	
UNITED STATES	MEMORANDUM OF DECISION

This civil action has been tried by the court without a jury through consent of the parties. Plaintiff brought suit pursuant to 7 U.S.C. §2022 for judicial review of a final administrative decision of the Food and Nutrition Service of the United States Department of Agriculture dated July 19, 1977 disqualifying plaintiff from participating in the Food Stamp Program for a period of sixty days. Plaintiff was represented at the trial by Robert A. Farris, Jr. and the defendant was represented by Assistant United States

Attorney Abraham Penn Jones.

Plaintiff has been operating the Super Duper Food Store on South Pender Street in Wilson, North Carolina as an authorized participant in the Food Stamp Program administered by the Food and Nutrition Service of the United States Department of Agriculture since 1970. The Food and Nutrition Service will be referred to for convenience as the "Service." Representatives of the Service called on the plaintiff at the time of his authorization, furnished him copies of the regulations and all information pertaining to the program, and plaintiff after having an opportunity to study them acknowledged that he understood the regulations. Thereafter the Service made a number of educational and investigative visits to plaintiff's store, and on each occasion ascertained

that plaintiff and his employees understood the regulations relating to the program. Beginning in 1975 the Service received several reports of possible violations of the program at the plaintiff's store. The Service was also concerned about the high food stamp redemption rate at plaintiff's store. However, the store is located in a predominantly low income and Negro neighborhood and a substantial volume of its business consists of food stamp items. Since 1970 the Service made seven educational visits and six compliance visits to plaintiff's store. On June 24, 1977 a charge letter was sent to plaintiff stating that there was reason to believe that plaintiff had violated the food stamp regulations in four transactions set out in the letter. Plaintiff responded to the letter by a personal visit to the field office of the Service

explaining circumstances which plaintiff contended satisfactorily explained the unauthorized sales which occurred, and plaintiff requested a review of the decision stated in its June 29, 1977 letter to disqualify plaintiff from the program for sixty days. The decision was upheld by the Service in its letter of October 12, 1977.

The court's findings of fact are based upon the testimony of witnesses offered by both parties and by various exhibits introduced by each, and upon the argument of counsel, and will be set forth in this memorandum pursuant to Rule 52, F.R.Civ.P.

On March 22 and 23, 1977 the Service conducted an undercover investigation at plaintiff's store in Wilson, using special agent Edmund B. Deyo, Jr., accompanied by investigative aide Kamal Ali Mansour, a private citizen and

owner of Capital City Cycle Sales, Inc. in Raleigh. They entered the store on those two days during the forenoon hours and shopped throughout the store using grocery carts. They selected numerous items from the shelves and pushed their filled grocery carts to the checkout counter. Mansour was first to arrive. He placed his selections on the counter in front of the plaintiff's long time cashier, Ilda Bryant, and displayed his food stamp book to her holding it open in his hand. She checked out his purchases, accepted his stamps and gave him the appropriate change in stamps and cash, bagged his purchases and completed his transaction. Deyo purchased his selections in exactly the same manner, displaying his food stamp book to Mrs. Bryant. She completed his purchase, accepted his food stamps and gave him the appropriate change in stamps and cash. Mansour's

purchases totaled $9.20, Deyo's purchases totaled $11.07. Mansour's purchases included the following items which are ineligible for food stamp purchases; Tide detergent, Purina dog chow, leather gloves, and soap. Deyo's purchases included the following items ineligible for purchase with food stamps: beer, leather gloves, cigarettes and matches, cigar, soap, bathroom tissues, and paper plates. The two agents carried their purchases out and left the store.

On the next day, March 23, 1977, the same two agents visited the store, shopped around the store in the same manner as on the previous day, and approached the check out counter where again Ilda Bryant was on duty. They had selected numerous ineligible items, for which Mrs. Bryant accepted food stamps in payment, including beer, lunch box and thermos bottle, matches, needles, sewing

thread, more beer, insect killer, plastic forks, deodorant, Drano drain opener, Tide detergent, paper towels, drinking cups and shelf and drawer paper.

The plaintiff and Ilda Bryant, as well as the other clerks in the store, were thoroughly familiar with the food stamps regulations and of the merchandise which was eligible for food stamp purchase and the merchandise which was not eligible, through instructions from plaintiff and periodic visits by representatives of the Service who instructed them concerning the regulations at each visit and impressed upon them the necessity of strict compliance with them.

The plaintiff testified in his own behalf, as did his produce manager, Nelmer Pope and the other clerks employed in the store, Minnie Pender, and Margaret Jefferson. From the outset the plaintiff

has denied knowledge of any food stamp violations occurring at his store, or that he violated any food stamp regulations himself. Principally through the testimony of Ilda Bryant the plaintiff offered to prove that by the appearance, dress, and conduct of the two undercover agents, Deyo and Mansour, she was so frightened and intimidated that when they appeared at the checkout counter with their purchases, both eligible and ineligible, she felt that she had to accept their food stamps in payment for all of the purchases. She explained that in the ten-block area served by the store almost all of the customers were Negro, mostly women; that some men shopped there, mostly on weekends, and these incidents occurred on Tuesday and Wednesday; that it was most unusual for two white men to come in the forenoon shopping together; that she was alone at

the front of the store, although Mr. Pope was in the rear of the store in the produce department; that she noticed the one with the beard (Mansour) pushing his cart up and back; it didn't look like somebody looking for particular items of groceries; she said they were poorly dressed, even for that section, in ragged Levis; she got suspicious and did not know what they were up to; she said she did not see any food stamps until after she had rung up the purchases and had opened the cash register; she said she didn't see anybody to call so she just took the food stamps; she told them she wasn't supposed to accept food stamps for those items, but they did not offer to put them back or to pay for them; "I just wanted them to go, they were so different from our usual customers."

Mrs. Bryant testified that the next day they came back again about the same

time and tried the same thing again; this time one of the other clerks was up front with her; she just rang up the purchases. "I felt I would have to let them have it."

The other clerks corroborated Ilda Bryant's testimony concerning the activities of the two undercover agents, describing them as dirty, poorly dressed, one with a beard, and that their clothes smelled of oil as if they worked at a gas station. If we were to accept as true all of the testimony concerning the appearance and activities of the undercover agents in the store, it fails to show any facts which could reasonably frighten or intimidate an employee of Mrs. Bryant's experience and maturity, including twelve years of working for the plaintiff at the store. In all the testimony of Mrs. Bryant and the other clerks concerning the actions of the two undercover agents, there was not a single

statement or action by them which could remotely be interpreted as menacing or threatening. Mr. Pope, the produce manager, was on duty at the rear of the store on the 22nd and Mrs. Bryant could easily have called him that she needed help. On the 23rd when the two agents entered the store and again began their shopping tour she had an opportunity to call to the telephone Mr. Tant or Mr. Pope or the police department or the sheriff's office. Instead, by her own testimony when the agents reached the counter she unhesitantly and without uttering a word checked out their purchases and accepted their coupons for numerous ineligible items. It puts too heavy a strain on credibility to accept her explanation of her sale of the ineligible items. Accordingly, plaintiff failed to offer any satisfactory justifi-

cation or excuse for the sale of the ineligible items for food stamps at his store as shown by the defendant's evidence.

CONCLUSIONS OF LAW

The court has jurisdiction of this action under 7 U.S.C. §2022.

The plaintiff as owner and operator of the store is responsible for food stamp violations committed by his clerks in the performance of their duties.

Plaintiff's clerk, Ilda Bryant, violated the food stamp regulations on March 22 and 23, 1977 by selling nonfood items ineligible for sale under the food stamp program in violation of 7 U.S.C. §2011, et. seq.

The Secretary of Agriculture has authorized to disqualify any retail store from participation in the food stamp program for a period not exceeding three

years pursuant to 7 U.S.C. §2020 and the food stamp regulations.

The court has jurisdiction to review the validity of the administrative penalty imposed by the secretary pursuant to 7 U.S.C. §2022.

On the question of the scope of judicial review of the administrative disqualification and the propriety of modifying the penalty imposed by the Secretary, the court is guided by the opinion of the Court of Appeals for the Fourth Circuit in Cross v. United States, 512 F.2d 1212 (1975). The court there held that the scope of judicial review under 7 U.S.C. §2022 extends to granting a trial de novo to determine the fact of violation of the Food Stamp Act and regulations, and in addition, the court may review the administrative sanction imposed for the violation and modify the period of the disqualification.

Nevertheless, the language used by the Fourth Circuit in Cross v. United States severely limits the scope of discretion allowed the trial court in modifying the penalty imposed.

> "In the instant case, there may be room to question the validity of the sanction, although we hasten to add that we express no view on what was a proper period of disqualification to impose on plaintiff. The district court characterized it as 'harsh,' but we do not conceive this to be a test. Rather, only in those instances in which it may be fairly said on the de novo record as a whole that the Secretary, acting through his designates, has abused his discretion by acting arbitrarily or capriciously, would the district court be warranted in exercising its authority to modify the penalty. Even in those instances in which a district court may find on de novo review that the Secretary erred in his determination of the fact and gravity of the

> violations, it would be incumbent on the district court to prescribe an alternate penalty, not on the basis of what it, in the exercise of its judgment, would consider reasonable and just, but within the guidelines set by the Secretary for the enforcement of the Act."

The regulations governing disqualification of retail food stores for violating the Food Stamp Act and Regulations are found in 7 CFR §278.6. The pertinent provisions are found in subsection (e) Penalties. Subparagraph (2) provides for a one-year disqualification if it is the firm's policy to sell expensive or conspicuous nonfood items, cartons of cigarettes, or alcoholic beverages and the firm has engaged in such practices.

Subsection (3) provides for a six-month disqualification. Subsection (4) provides for a ninety-day disqualification, and subsection (5)

provides for a sixty-day disqualification. It reads as follows:

> (5) Disqualify the firm for 60 days if the evidence shows that violations such as those described in paragraph (3)(i) of this subsection occurred, but that the violations resulted from carelessness or poor supervision by the firm's ownership or management.

With regard to the period of disqualification, in Cross v. United States the undercover agents of the Service made five investigatory shoppings of plaintiff's store and on each occasion the clerk accepted food stamps for ineligible items. The recommendation at the local level was disqualification for ninety days, but the acting director of the Service in Washington increased the disqualification to one year because of the large number of nongrocery items sold and that sufficient compliance action had been taken previously by the Service in

warnings and investigation. In Goodman v. United States, 518 F.2d 505 (5th Cir. 1975) the Service conducted three investigatory shopping visits to plaintiff's store and exchanged coupons for ineligible items, and the Service disqualified the plaintiff for a period of six months. In Lawrence v. United States, No. 79-4-Civ-2, Eastern District of North Carolina, March 5, 1980, undercover agents exchanged coupons for ineligible items at plaintiff's store on five occasions over a three-month period in 1977. Of 33 items purchased by the agents on those five occasions thirteen were ineligible and included $6.00 worth of gasoline, three cartons of cigarettes, a broom, cleaning materials, chewing tobacco, aluminum foil, paper products and toilet articles. At trial the plaintiff did not have any recollection

of any of the transactions testified to by the agents and had only a vague recollection of the many compliance visits by the Service representatives to educate him in compliance, and denied the violations. The district court held that the one-year penalty was not arbitrary and capricious or without justification and fact, and declined to modify the period of disqualification.

The sixty-day disqualification in the case before the court falls clearly within the range of administrative punishment granted to the Service for violations. Upon the evidence in the case the Service could have imposed a longer period of disqualification. The court therefore concludes that the sixty-day disqualification was not arbitrary and capricious or without justification in fact, and the court considers that a proper exercise of its

reviewing authority leads clearly to its decision not to modify the period of disqualification.

An appropriate judgment will be entered.

This 30th day of October, 1980.

/s/ Logan D. Howell
LOGAN D. HOWELL, UNITED STATES MAGISTRATE

UNITED STATES DEPARTMENT OF AGRICULTURE
Food and Nutrition Service
Washington, D. C. 20250

FNS (FS) INSTRUCTION 744-9

ACTION BY: Food Stamp Division
Regional and Field Offices

Food Stamp Program
Criteria for Final Determinations in OIG Investigative Cases

I PURPOSE

This Instruction:

A Explains the factors to be considered in recommending and making final determinations in Office of the Inspector General (OIG) investigative cases, and

B Lists and discusses these final determinations.

II GENERAL

The action taken against a retailer or wholesaler for violations revealed during an OIG investigation has important consequences. The choice between disqualifying a retailer and limiting the

action to a warning is a very significant one.

The violating retailer is the person most directly affected by the action taken. Disqualification will mean not only a temporary loss of business, but also adverse publicity for the store. In addition, it may mean the permanent loss of his food stamp customers to other stores. Or, if he is highly dependent upon his food stamp business, disqualification may mean that he will be forced to close his store.

On the other hand, failure to disqualify may adversely affect other retailers in the vicinity, particularly if they have lost business because of the violations. If the violating retailer is not disqualified and continues to violate, his competitors may feel compelled to follow suit. In addition, others who were already violating may

disregard the regulations more flagrantly if they see that violators are not being punished.

Finally, the success of the Food Stamp Program greatly depends upon making equitable decisions in violation cases. When necessary, retailers must be disqualified in order to protect the program from abuse. However, the need to disqualify must never obscure the need to treat retailers consistently and to have an adequate basis of evidence for the action. Disqualifying inconsistently or too readily can result in alienation of the food trade industry and public criticism of the Department for being arbitrary and harsh with violators. In addition, it may seriously undermine the continuing attempt to obtain voluntary compliance since it may lead retailers to believe that the Department itself has

lost interest in the concept of voluntary compliance.

In sum, retailers must be disqualified when necessary. But, just as importantly, the retailer must have been given a fair opportunity to abide by the regulations and there must be sufficient evidence to make a reasonable and fair determination which can be defended should the case go to review. The guidelines in this Instruction are designed to make sure that all aspects of a case are carefully examined with these points in mind.

III FACTORS CONSIDERED IN RECOMMENDING AND MAKING FINAL DETERMINATIONS

The analysis of each case shall be directed toward answering three major questions: (1) <u>The extent of program harm</u>. Are the violations resulting in diversions of food stamp funds, or are they technical infringements of the

regulations? (2) The reason for the violations. Are the violations due to misunderstanding, carelessness, or store policy? (3) The adequacy of previous administrative action. Did FNS personnel make a reasonable effort before the investigation to make the retailer aware of the regulations and his responsibilities? In addition, was the retailer warned about violations?

No two cases are exactly alike. Therefore, no guidelines can precisely cover all parts of every case. A measure of individual judgment will be needed in each case analysis. The three major factors to be considered in analyzing a case are discussed below.

A Extent of Program Harm. The extent of program harm resulting from the violations being studied may be determined by considering the following factors:

1 Number of Violations. The number of illegal transactions shown in the investigative report is an important indication of how widespread the violations are. The reviewer must consider not only the violations in which OIG investigative aides participated, but also the violations revealed as secondary evidence in the statements of recipients, store personnel, and others.

To be considered in making the final determination, secondary evidence must be from a first-hand source, i.e., the person making the statement must either have actually witnessed or participated in the violations. Secondary evidence will be given the same weight as evidence obtained by OIG investigative aides, as long as the evidence seems credible. Since no physical evidence usually exists to support secondary evidence, determining credibility will depend upon con-

sideration of factors such as:

a The number of persons who admit participating in or witnessing violations,

b The reputed reliability of the persons making the statements, and

c The amount of specific detail about the violations contained in the statements.

2 Nature of the Violations. Another major consideration in determining the extent of program harm is the nature of the violations which occurred. Technical violations, such as the acceptance of endorsed 50-cent coupons, will not be given as much weight as will violations which result in diversion of food stamp funds from their purpose of providing eligible food, such as the sale of ineligible items and the exchange of cash for coupons.

3 Scope of Violations. A third consideration is the scope of violations, i.e., the amount of coupons, cash, excess due bills, etc., involved in illegal transactions, and the number and type of ineligible items sold. (See A 4 below for guidelines in evaluating ineligible items violations.) Generally the greater the scope of the violation, the more serious the violation will be considered.

4 Evaluating Ineligible Item Violations. To properly evaluate ineligible item violations, the reviewer must consider the following factors:

a Types of Ineligible Items. To help the reviewer in his evaluation, ineligible items are divided into three types; marginal, common grocery, and major non-grocery types. The reviewer must carefully consider the types of ineligibles sold in order to determine

the seriousness of the violations.

EXAMPLE: The sale of an electric mixer would be considered more serious than the sale of a box of detergent.

(1) Marginal Ineligible Items are items which can easily be mistaken for eligible items and sold for coupons through oversight.

EXAMPLES: Canned pet food or imported food products.

(2) Common Grocery Type Ineligible Items are easily identifiable ineligible items of low cost.

EXAMPLES: Cleaning products such as soap, or paper products such as toilet tissue.

(3) Major Non-Grocery Type Ineligible Items are alcoholic beverages and easily identifiable ineligible items of high cost.

EXAMPLES: Clothing, home furnishings,

hardware, cartons of cigarettes, or alcoholic beverages.

b Comparing Numbers and Types of Ineligible and Eligible Items. The reviewer must compare the number and type of ineligible items sold in each transaction to the number and type of eligible items sold. Such a comparison should enable the reviewer to judge whether the transaction was clearly violative or whether the ineligible items could easily have been sold without being noticed.

EXAMPLE: A transaction in which only two of twenty items sold were ineligible would not be considered as serious as one in which over half the items sold were ineligible. In fact, the two ineligible items might not be considered at all in reaching a final determination if they were not of a serious nature and could easily be overlooked at the check stand.

NOTE: In counting the number of items sold in a transaction, the reviewer should bear in mind that items of the same type and brand are often sold in combination. In view of this, when several items of the same type and brand tempt to comply with the regulations, or only a device to limit the violations.

In evaluating partial refusals, the reviewer shall carefully examine the type and number of items sold and refused, and the number of times partial and complete refusals occurred. Also, the remarks of the clerks may be significant in this evaluation. In most cases, the benefit of the doubt should be to the retailer, and the partial refusal should be considered a true effort to obey the law. Only occasionally should the partial refusal be discounted, and then only when there is good reason for doing

so. For example, a partial refusal may still be considered a clearly violative transaction if a sizable number of common grocery type ineligible items are sold, and the only items refused are of non-grocery type such as beer.

3 Circumstances Surrounding Violations. The context of the situation in which violations occurred must be considered to see whether the violations were committed as inadvertent errors, misunderstanding, favors, or store policy. The context must be considered even when the violations involve diversions of program funds such as the exchange of cash for coupons or the sale of alcoholic beverages.

EXAMPLE: The exchange of cash for coupons at par in small amounts as favors to the recipients, would be given less weight than the discounting of coupons by the retailer for his own profit. Also,

the clerks may be profiting from accepting coupons for cash without the knowledge of the owner or management.

4 Store Policy. The complete case record shall be analyzed to determine if violating the program was store policy. At least one of the following factors has to be present before violations can be considered store policy:

a Substantial participation by the owner, responsible members of his family, or the management in the violations,

b Admissions by the owner, management, or clerks that instructions were given to violate the program,

c Physical proof, such as written instructions from the owner or management, indicating that violations were permitted as store policy,

d A combination of violative evidence and previous compliance action which shows that consistent violations continued despite a reasonable attempt by FNS personnel to correct the situation by making the owner or management aware that violations were probably occurring in the store, and

e Any other evidence which shows that the owner or management had to be aware that violations were occurring and did nothing to stop them.

C The Adequacy of Previous Administrative Action. For the purpose of this Instruction, administrative action is divided into two categories; (1) educational action, and (2) compliance action. Educational action is present to some degree in all cases. Compliance action is not present in all cases.

1 Educational Action. The reviewer must carefully evaluate all

educational action taken by FNS personnel before the investigation to see if a reasonable effort was made to make the retailer aware of the regulations and his responsibilities to abide by them. Such educational action may include:

a Information given out before and during the original meeting with merchants in a designated Food Stamp Project Area,

b Authorization meetings and interviews,

c Educational sessions with store personnel,

d Educational store visits,

e General compliance letters explaining the program and regulations, and

f Any other material distributed or action taken to help

retailers know and meet program requirements.

2 Compliance Action.

Compliance action is any action taken to confront the retailer with the possibility that violations are being committed in his store and cautioning him against further violations. Such action may be taken as a result of admitted or observed violations, rumors or complaints, unusually high or erratic redemptions, or general suspicion about the store.

The reviewer must carefully examine the record of compliance action to see if the retailer received clear and significant warning about violations before the investigation. Normally, all of the following factors must be present before compliance action will be considered significant and thereby make a difference in the final determination:

a There was a compliance store visit during which the retailer was confronted with the possibility of violations in the store, questioned about his understanding of the regulations, and cautioned;

b A confirming or warning letter was sent as a follow-up to the visit; and

c The action was taken not more than three years prior to the actual investigation, or, if the action was aimed primarily at technical violations such as the acceptance of loose $2 coupons, not more than one year prior to the actual investigation.

NOTE: In the event that there has been a change in management in the store since the compliance action was taken, special consideration shall be given to whether or not the owner or appropriate representative, such as a district manager, of

the store was made aware of the action.

3 Previous Periods of Disqualification. Normally, previous periods of disqualification resulting from earlier OIG investigations will result in stronger final determinations.

IV CRITERIA FOR FINAL DETERMINATIONS

After the complete case record is examined in light of the three questions discussed in Section III, the most appropriate final determination listed below should be recommended or made for the case. As mentioned previously, any guidelines given for use in considering cases are necessarily imprecise. The reviewer should attempt to choose a determination which is both reasonable and consistent with previous determinations in similar cases. It is highly important to review previous cases which are similar in nature and to compare the

final determinations in them with the action selected for the present case.

NOTE: To disqualify a retailer for the sale of ineligible items, there must be a minimum of three successful buys of such items, except in highly unusual situations.

A Three-Year Disqualifications. The regulations governing the program state that a three-year disqualification is the maximum period which will be assigned. Three-year disqualifications are reserved for unusually serious cases.

EXAMPLES:

1 A three-year disqualification will be assigned to a retailer who has been previously disqualified from the program for a substantial period and who has been reinvestigated and found to be violating the program seriously again.

2 A three-year disqualification will be assigned to any case involving flagrant violations which result in major diversions of food stamp funds, such as the fraudulent alteration of redemption certificates or the purchase of identification cares from recipients for the purpose of fraudulently obtaining bonus coupons.

B <u>One-Year Disqualifications</u>. A one-year disqualification is normally the maximum period which will be assigned to a retailer not previously disqualified from the program. One-year disqualifications usually will be assigned in the following situations:

1 The evidence clearly shows that the retailer, as a matter of store policy, is engaged in violations such as:

a The discounting of coupons for cash, which may take the form of accepting coupons as repayment of cash

loans with interest or other devices to exchange coupons for cash at a discount, or

b The sale of ineligible items such as alcoholic beverages and other major non-grocery type items.

2 FNS personnel have taken significant compliance action to prevent violations, and the evidence clearly shows that the retailer is engaged in violations such as:

a To a limited extent, the types of violations listed in B 1 under one-year disqualifications, or

b Any violations which show a deliberate and widespread disregard for program regulations.

C Six-Month Disqualifications. Six-month disqualifications will be assigned in the following situations:

1 The evidence is the same as that described in B 2 under one-year disqualifications, but compliance action is either lacking or too limited to support a one-year disqualification. The record should show, however, that a reasonable educational effort has been made by FNS personnel to make the retailer aware of the regulations and his responsibilities.

2 FNS personnel have taken significant compliance action to prevent violations, and the evidence clearly shows that the retailer, as a matter of store policy, is engaged in violations such as:

a The sale of common grocery type ineligible items in amounts which tend to be found in a normal shopping basket, or

b Any violations committed on the condition that recipients spend their coupons at the violating store.

D Ninety-Day Disqualifications. Ninety-day disqualifications normally will be assigned in cases like those described in C 2 under six-month disqualifications, where compliance action is either lacking or too limited to support a six-month disqualification. The record should show, however, that a reasonable educational effort has been made by FNS personnel to make the retailer aware of the regulations and his responsibilities.

E Thirty-or-Sixty-Day Disqualifications. The choice between a thirty or sixty-day disqualification will depend upon the extent of the violations committed, the responsibility of the store personnel involved, and the extent

of the previous compliance action. Thirty- or sixty-day disqualifications normally will be assigned in the following situations:

1 The evidence shows that violations occurred due to poor supervision and general carelessness, even though FNS personnel made a significant compliance effort before the investigation to prevent violations.

2 The evidence is of such an unusually serious nature that a period of disqualification is called for, even though the violations were caused by poor supervision and general carelessness, and FNS personnel did not take significant compliance action prior to the investigation to prevent violations. EXAMPLES:

a Large amounts of common grocery type ineligible items are sold and all attempts to buy such items

successful.

b Large amounts of major non-grocery type items are sold.

3 The evidence is limited to only three successful clearly violative buys of ineligible items, and FNS personnel took significant compliance action before the investigation to prevent violations. EXCEPTION: This limitation on the number of successful buys does not preclude disqualification in cases where:

a The violations are few in number but extremely serious; or

b The violations are basically of a technical nature, but further attempts to correct the situation through warnings appear completely fruitless, for example, despite

numerous previous warnings by FNS personnel, the retailer continues to require food coupon customers to trade out the change due them.

F Warning Letters. A warning letter will normally be the final determination in the following situations:

1 The evidence is the same as that described in either paragraph E 1 or 3, above, under 30- or 60-day disqualifications, but compliance action is either lacking or too limited to support a period of disqualification.

2 The evidence is limited to only one or two successful clearly violative buys of ineligible items.

3 The evidence clearly shows that violations occurred contrary to the retailer's policy.

4 The investigation discloses only minor violations, such as the return of an endorsed $1 coupon as change.

G Warning Letters and Requests for Reinvestigation. Investigations which disclose little evidence but which indicate that widespread violations may be occurring will result in warning letters and requests for reinvestigation.

Opposition

Office - Supreme Court, U.S.
FILED
DEC 22 1981
ALEXANDER L. STEVAS,

No. 81-923

In the Supreme Court of the United States

OCTOBER TERM, 1981

ODELL C. TANT, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
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QUESTIONS PRESENTED

1. Whether the district court was required to review de novo the decision of the Department of Agriculture disqualifying petitioner's food store from participating in the Food Stamp Program for a period of 60 days.

2. Whether under the facts of this case a 60-day disqualification from the Food Stamp Program was arbitrary or capricious.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-32) is reported at 656 F. 2d 961. The opinion of the magistrate (Pet. App. 33-51) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1981. The petition for a writ of certiorari was filed on November 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant statutory provision is set forth at Pet. 5-8.[1]

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[1]Petitioner has annexed the judicial review provision of the current Act, the Food Stamp Act of 1977, rather than the provision of the applicable Act, the Food Stamp Act of 1964. See note 2, *infra*. However, the two Acts do not differ materially with respect to this provision.

STATEMENT

1. The Food Stamp Program was enacted as part of the Food Stamp Act of 1964, 7 U.S.C. 2011 *et seq.*, with the twin purposes of raising the nutrition levels of low-income households and strengthening our agricultural economy. 7 U.S.C. 2011.[2] The Secretary of Agriculture is responsible for administering the Act, which involves using state agencies to provide eligible households with the opportunity to purchase food stamps at a discount from the face value of the stamps. The Secretary has been given broad authority to promulgate regulations consistent with the purposes of the program. 7 U.S.C. 2013(b) and (c).

As part of his responsibility, the Secretary approves retail food stores for participation in the program, 7 U.S.C. 2017, and disqualifies program participants that have violated any provisions of the Act or its implementing regulations. 7 U.S.C. 2020. One common ground for disqualification is violation of 7 C.F.R. 272.2(b) (1977), which limits use of food stamp coupons to the purchase of "eligible food[s]."[3] Violation of this and other regulations are punishable by disqualification for reasonable periods of up to three years.

2. Petitioner owns and operates a food store in Wilson, North Carolina, and has participated in the Food Stamp Program since 1970 (Pet. App. 34). Because of reports of

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[2]The Food Stamp Act was substantially amended in 1977. However, the enacting section provided that the new statute would not become effective until the Department of Agriculture adopted implementing regulations. Pub. L. No. 95-113, Section 1303, 91 Stat. 979, 7 U.S.C. (Supp. IV) 2011 note. These regulations were not adopted until September 22, 1978, and did not become effective until January 1, 1979. Accordingly, since the violations in this case occurred in 1977, the Food Stamp Act of 1964 was applicable and all citations herein are to that Act and the regulations in effect in 1977.

[3]"Eligible food[s]" are defined specifically as "any food or food product for human consumption except alcoholic beverages and tobacco * * *." 7 C.F.R. 270.2(s) (1977).

possible violations beginning as early as 1975 and the high ratio of coupon redemptions to reported food sales, the Department, through its Food and Nutrition Service (FNS), initiated an investigation to determine whether petitioner was complying with the Act and its regulations (*id.* at 35-36).

On March 22 and 23, 1977, two FNS agents successfully purchased numerous ineligible items with food stamps from petitioner's store. Indeed, 63% of all items purchased were ineligible, and these items included beer, cigarettes, soap, leather gloves, and other nonfood products (Pet. App. 23-24, 36-39).

As a result of the investigation, a charge letter was sent to petitioner on June 24, 1977 (Pet. App. 35). Petitioner protested the charge in a personal visit to the FNS field office, but the violations were found to have occurred and petitioner's store was disqualified from the program for 60 days (*id.* at 35-36). Petitioner sought review of the FNS action by the Food Stamp Review Officer, who affirmed the 60-day disqualification (*id.* at 24).

Pursuant to 7 U.S.C. 2022, petitioner commenced this suit in state court to review the administrative determination, and the government removed the case to the United States District Court for the Eastern District of North Carolina (Pet. App. 24). The case was tried before a magistrate who found that the violations had occurred and that there was no satisfactory excuse or justification for them (*id.* at 43-44).[4]

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[4]Petitioner's defense was that the presence of two white investigators in a store predominantly visited by non-whites had intimidated petitioner's cashier into allowing these ineligible purchases (Pet. App. 40-41). The court rejected this explanation for the violations, finding that "[i]t puts too heavy a strain on credibility * * *" (*id.* at 43).

The magistrate then reviewed the administrative sanction in accordance with the rule announced by the Fourth Circuit in *Cross* v. *United States*, 512 F. 2d 1212 (1975), which permits judicial review of sanctions in food stamp cases under an arbitrary and capricious standard (Pet. App. 45). The magistrate found that the 60-day disqualification was clearly within the range allowed by the regulations and that, on the facts of this case, the FNS could permissibly have imposed an even stiffer sanction. He therefore concluded that the sanction was not arbitrary and capricious (*id.* at 50).

The court of appeals affirmed (Pet. App. 21-32). It held that due to the nature and extent of the unjustified violations "the FNS acted well within the scope of both the regulations and the guidelines in imposing a sixty-day penalty" (*id.* at 31-32).

ARGUMENT

1. Petitioner initially contends (Pet. 11-15) that he was entitled to a de novo review of the administrative sanction. This argument is based solely on the statutory language of 7 U.S.C. 2022, which provides for a trial de novo of the "validity of the questioned administrative action in issue."

The courts of appeals, relying upon *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182 (1973), have consistently held that Congress did not intend by this language to require the courts to exercise de novo review of the administrative sanction. See *Kulkin* v. *Bergland*, 626 F. 2d 181, 184 (1st Cir. 1980) (sanction reviewable under arbitrary and capricious standard); *Cross* v. *United States*, 512 F. 2d 1212, 1218 (4th Cir. 1975) (same). See also *Martin* v. *United States*, 459 F. 2d 300, 301 (6th Cir.), cert. denied, 409 U.S. 878 (1972) (no judicial review of sanction). Rather, Congress simply contemplated exhaustive judicial review of the Secretary's factual finding that a violation occurred.

Petitioner received a full trial de novo on whether the violations occurred and whether they were justified, and he received a judicial determination of whether the sanction imposed was arbitrary and capricious. He was not entitled by statute to a more searching judicial scrutiny, because " 'the relation of remedy to policy is peculiarly a matter for administrative competence.' " *American Power Co.* v. *SEC*, 329 U.S. 90, 112 (1946), quoting *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941).[5]

2. Petitioner also contends (Pet. 15-19) that the disqualification of his store from the Food Stamp Program for a period of 60 days was arbitrary and capricious. This fact-bound claim is, however, contrary to the record. Petitioner's store sold major ineligible items, including beer and cigarettes, to FNS investigators in four separate transactions, and these items constituted 63% of all the items sold. In view of the number and kind of ineligible items involved, both the district court and court of appeals agreed that the 60-day disqualification was, if anything, lenient, but clearly within the FNS regulations and guidelines, and therefore not arbitrary and capricious.

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[5]As the House Report on the 1977 reenactment of the judicial review provision states, "review of the factual determination that a violation occurred is normal grist for the courts; review of the length of a highly discretionary sentence of disqualification is not." H.R. Rep. No. 95-345, 95th Cong., 1st Sess. 398 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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DECEMBER 1981

DOJ-1981-12